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ORIGINAL
FILED

AUG 16 2007

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT
 9
 10 NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, and SONIA
 12 DUNN-RUIZ an individual,

13 Plaintiffs,

14 vs.

15 IRWIN INDUSTRIAL TOOL COMPANY, THE
 16 HOME DEPOT, INC., and DOES 2 through 100,
 inclusive,

17 Defendants.

18 BERNZOMATIC,

19 Third Party Plaintiff,

20 vs.

21 WESTERN INDUSTRIES, INC.,
 22 WORTHINGTON INDUSTRIES, AND ROES 2
 23 through 100, inclusive,

24 Third Party Defendants.

CASE NO.: C06-07026 MJJ

Judge Martin J. Jenkins

WORTHINGTON INDUSTRIES, INC.'S
ANSWER TO BERNZOMATIC'S THIRD
PARTY COMPLAINT

BY FAX

25 Third Party Defendant Worthington Industries, Inc. ("Worthington") responds to Third Party
 26 Plaintiff Bernzomatic's Third Party Complaint as follows:
 27
 28

CASE NO.: C06-07026 MJJ

1

WORTHINGTON INDUSTRIES, INC.'S ANSWER TO BERNZOMATIC'S THIRD PARTY COMPLAINT

THE PARTIES

1. Defendant/ Third Party Plaintiff, Bernzomatic, is a Delaware corporation, with its principal place of business in North Carolina.

RESPONSE: Worthington is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 and on that basis denies each and every allegation contained therein.

2. Third Party Defendant, Western Industries, Inc., is a closely-held corporation with its principal place of business in Wisconsin.

RESPONSE: Worthington is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 and on that basis denies each and every allegation contained therein.

3. Third Party Defendant, Worthington Industries, Inc., is an Ohio corporation with its principal place of business in Ohio.

RESPONSE: Worthington admits the allegations in Paragraph 3.

4. At various times, both Western and Worthington manufactured and sold Bernzomatic-branded MAPP gas cylinders.

RESPONSE: Worthington admits that Worthington Cylinders Wisconsin, LLC and Western at various times manufactured and sold Bernzomatic-branded MAPP gas cylinders. Worthington denies the remaining allegations in Paragraph 4.

5. Worthington purchased Western's cylinder business in September 2004.

RESPONSE: Worthington admits that Worthington Cylinder Acquisition, LLC purchased certain assets from Western in September 2004. Worthington denies the remaining allegations in Paragraph 5.

11

JURIDICTION AND VENUE

6. Subject matter jurisdiction is proper in this Court because federal district courts in California recognize the rights of Third Party Complainant to Declarations of Rights, Breach of Contract Claims, Contractual Indemnity, Common Law Indemnity and Punitive Damages. This Court has Personal Jurisdiction over the Third Party Defendants under the California long-arm statute as the actions or failures to act by the Third Party Defendants caused damage to the Defendant/Third Party Plaintiff and gave rise to claims in California.

RESPONSE: Worthington denies that its actions or failures to act caused damage to Bernzomatic. Worthington is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6 and on that basis denies each and every remaining allegation contained therein.

7. Venue is proper in this Court because all of the Plaintiffs' litigation claims arose in this jurisdiction, and all of the Third Party Complaint claims are derivative of those litigation claims.

RESPONSE: Worthington is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 and on that basis denies each and every allegation contained therein.

FACTUAL ALLEGATIONS

8. Defendant/ Third Party Plaintiff, Bernzomatic, has been named as a Defendant in the above-captioned lawsuit (the "Shalaby litigation".) Plaintiffs filed suit on October 10, 2006 and recently amended their Complaint on June 11, 2007.

RESPONSE: Worthington admits that Plaintiffs filed suit in or about October 10, 2006 and amended their complaint on or about June 11, 2007 and that such complaints speak for themselves. Worthington is without knowledge or information sufficient to form a belief as to the truth of the

1 remaining allegations in Paragraph 8 and on that basis denies each and every remaining allegation
2 contained therein.

3 9. The Joint Case Management Statement and Order entered on February 20, 2007 alleges
4 that Plaintiff, Andrew Shalaby, suffered burns to his face and extremities due to an accident involving a
5 Bernzomatic-branded MAPP gas cylinder that he used to light a campfire. It further alleges that liquid
6 MAPP gas inside the pressurized cylinder absorbed energy from the surrounding fire and heated up
7 such that it vaporized causing the cylinder to produce "an explosive effect."

8 9. **RESPONSE:** Worthington admits that the February 20, 2007 Joint Case Management
9 Statement and Order speaks for itself. Worthington is without knowledge or information sufficient to
10 form a belief as to the truth of the remaining allegations in Paragraph 9 and on that basis denies each
11 and every remaining allegation contained therein.

12 10. The Joint Case Management Statement and Order entered on February 20, 2007 states
13 that fire department personnel who responded during the incident instructed the onsite manager to
14 discard the product. Depositions of fire department and onsite personnel were taken on April 17, 2007
15 confirming that the product had been discarded.

16 18. **RESPONSE:** Worthington admits that the February 20, 2007 Joint Case Management
17 Statement and Order speaks for itself and that certain depositions of fire department and campground
18 personnel have been taken. Worthington is without knowledge or information sufficient to form a
19 belief as to the truth of the remaining allegations in Paragraph 10 and on that basis denies each and
20 every remaining allegation contained therein.

21 24. 11. Third Party Defendants, Western and Worthington, manufactured MAPP gas cylinders,
22 such as the one allegedly involved in this action.

23 26. **RESPONSE:** Worthington admits that Western and Worthington Cylinders Wisconsin, LLC
24 manufactured MAPP gas cylinders. Worthington denies the remaining allegations in Paragraph 11 that

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1 are directed at Worthington. Worthington is without knowledge or information sufficient to form a
2 belief as to the truth of the remaining allegations in Paragraph 11 and on that basis denies each and
3 every remaining allegation contained therein.

4 12. Defendant/Third Party Plaintiff purchased MAPP gas cylinders exclusively from
5 Western and Worthington during the time periods relevant to this action.
6

7 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
8 the truth of the allegations in Paragraph 12 and on that basis denies each and every allegation contained
9 therein.

10 13. To the extent that a Bernzomatic-branded MAPP gas cylinder was involved in the
11 accident which forms the basis of Plaintiffs' Complaint against Bernzomatic and Home Depot, said
12 MAPP gas cylinder was manufactured by either Western or Worthington.
13

14 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
15 the truth of the allegations in Paragraph 13 and on that basis denies each and every allegation contained
16 therein.

17 14. Defendant/ Third Party Plaintiff cannot determine whether Western or Worthington
18 manufactured the MAPP gas cylinder involved because the fire department personnel who responded
19 during the incident instructed the onsite manager to discard the product and it cannot be recovered.
20

21 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
22 the truth of the allegations in Paragraph 14 and on that basis denies each and every allegation contained
23 therein.

24 15. Upon information and belief, the written contract between Worthington and Western
25 regarding the sale of the cylinder business in September 2004 contains an express provision setting
26 forth a method to facilitate identification of a cylinder's manufacturer if it cannot be determined by a
27 serial number or other reliable information.
28

1 **RESPONSE:** Worthington admits that there is a written contract between Worthington
 2 Cylinder Acquisition, LLC and Western regarding the sale of certain assets and that the contract speaks
 3 for itself. Worthington denies the remaining allegations in Paragraph 15.

4 **FIRST CLAIM – DECLARATION OF RIGHTS**

5 16. Defendant/ Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1
 6 through 15 of this Third Party Complaint as if fully rewritten herein.

8 **RESPONSE:** Worthington refers to Paragraphs 1 through 15 of this Answer to Bernzomatic's
 9 Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

10 17. Exclusive Supply Agreements between Newell Operating Company (a predecessor to
 11 Industrial Tool Company, dba Bernzomatic) and Western in 2001, as well as between Irwin Industrial
 12 Tool Company, dba Bernzomatic, and Worthington in 2006 for Western's and Worthington's MAPP
 13 gas cylinders included indemnification provisions. In September 2004, Worthington assumed the rights
 14 and obligations of Western under the 2001 Supply Agreement resulting from Worthington's purchase of
 15 Western's cylinder business at that time.

17 **RESPONSE:** Worthington admits that supply agreements between Western and Newell
 18 Operating Company and between Irwin Industrial Tool Company and Worthington Cylinders
 19 Wisconsin, LLC were entered into and speak for themselves. Worthington denies the remaining
 20 allegations in Paragraph 17 that are directed at Worthington. Worthington is without knowledge or
 21 information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 17 and
 22 on that basis denies each and every remaining allegation contained therein.

24 18. The indemnification provision at page 10 of the Agreement between Newell
 25 (Bernzomatic) and Western states, in pertinent part:

26 “Western assumes and agrees to indemnify, defend and hold harmless Newell and its affiliates,
 27 directors, officers, employees and agents for all claims against Newell for personal injury or

1 property damage to the extent such injury or damage is alleged to be caused by or is caused by
2 the sale or distribution of Covered Cylinders supplied under this Agreement that were not
3 suitable for sale, distribution or use due to the design, manufacture, labeling or failure to label,
4 or storage prior to delivery to Newell of such Covered Cylinders. Western further agrees to
5 indemnify, defend and hold harmless Newell and its affiliates, directors, officers, employees and
6 agents for all claims against Newell resulting from the failure to manufacture products in
7 accordance with applicable laws including environmental and labor laws.”

8
9 **RESPONSE:** Worthington admits that the supply agreement between Western and Newell
10 Operating Company speaks for itself. Worthington is without knowledge or information sufficient to
11 form a belief as to the truth of the remaining allegations in Paragraph 18 and on that basis denies each
12 and every remaining allegation contained therein.

13
14 19. The indemnification provision at page 8 of the Agreement between Irwin Industrial Tool
15 Company (Bernzomatic) and Worthington states, in pertinent part;

16 “WCW (Worthington) assumes and agrees to indemnify, defend and hold harmless Bernzomatic
17 and its customers, affiliates, directors, officers, employees and agents for all claims against
18 Bernzomatic for personal injury or property damage to the extent such injury or damage is
19 alleged to be cause(d) by or is caused by in whole or in part the sale or distribution of Covered
20 Cylinders supplied under this Agreement that were not suitable for sale, distribution or use due
21 to the design, manufacture, labeling or failure to label (except as provided in Section 4.4), or
22 storage prior to delivery to Bernzomatic of such Covered Cylinders. WCW further agrees to
23 indemnify, defend and hold harmless Bernzomatic and its affiliates, directors, officers,
24 employees and agents for all claims against Bernzomatic resulting from the failure to
25 manufacture products in accordance with applicable laws.”

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1 **RESPONSE:** Worthington admits that the supply agreement between Bernzomatic and
2 Worthington Cylinders Wisconsin, LLC speaks for itself. Worthington denies the remaining allegations
3 in Paragraph 19 that are directed at Worthington. Worthington is without knowledge or information
4 sufficient to form a belief as to the truth of the remaining allegations in Paragraph 19 and on that basis
5 denies each and every remaining allegation contained therein.
6

7 20. The allegations in the Shalaby litigation are for personal injury caused by the sale or
8 distribution of covered cylinders – (a Bernzomatic-branded MAPP gas cylinder) – manufactured and
9 sold by Western and Worthington pursuant to the Supply Agreements, which contained the above-cited
10 indemnification provisions.

11 **RESPONSE:** The allegations in the Shalaby litigation speak for themselves. Worthington
12 denies the remaining allegations in Paragraph 20 that are directed at Worthington. Worthington is
13 without knowledge or information sufficient to form a belief as to the truth of the remaining allegations
14 in Paragraph 20 and on that basis denies each and every remaining allegation contained therein.
15

16 21. Pursuant to the indemnification provisions, Bernzomatic tendered its defense and
17 indemnification to Western on June 19, 2006, and to Worthington on January 24, 2007.
18

19 **RESPONSE:** Worthington admits that Bernzomatic tendered the defense of the Shalaby matter
20 to Worthington. Worthington is without knowledge or information sufficient to form a belief as to the
21 truth of the remaining allegations in Paragraph 21 and on that basis denies each and every remaining
22 allegation contained therein.
23

24 22. To date, Western has neither defended nor indemnified Bernzomatic, which is a breach
25 of the indemnification provision in the Supply Agreement.
26

27 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
28 the truth of the allegations in Paragraph 22 and on that basis denies each and every allegation contained
therein.
29

1 23. To date, Worthington, has neither defended nor indemnified Bernzomatic, which is a
2 breach of the indemnification provision in the Supply Agreement.

3 **RESPONSE:** Worthington admits that it has not defended nor indemnified Bernzomatic.
4 Worthington denies the remaining allegations in Paragraph 23.

5 24. An actual dispute exists between Defendant/Third Party Plaintiff and Plaintiffs, Andrew
6 Shalaby and Sonia Dunn-Ruiz.

7 **RESPONSE:** Worthington admits that a dispute exists between Plaintiffs and Irwin Industrial
8 Tool Company. Worthington is without knowledge or information sufficient to form a belief as to the
9 truth of the remaining allegations in Paragraph 24 and on that basis denies each and every remaining
10 allegation contained therein.

11 25. Bernzomatic is entitled to a declaration of rights under the contracts against Western and
12 Worthington and the obligations under the indemnification provisions of the Supply Agreement as
13 follows:

14 a. Western is obligated under the indemnification provisions of the Supply
15 Agreement and by virtue of its breach of its duty to defendant Bernzomatic in the Shalaby litigation, to
16 indemnify Bernzomatic with respect to the full amount of all defense costs and any liability or
17 settlement in the Shalaby litigation without any cost sharing, apportionment between particular claims
18 or allegations, or limitation on amount.

19 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
20 the truth of the allegations in Paragraph 25(a) and on that basis denies each and every allegation
21 contained therein.

22 b. Worthington is obligated under the indemnification provisions of the Supply
23 Agreement and by virtue of its breach of its duty to defendant Bernzomatic in the Shalaby litigation, to
24 indemnify Bernzomatic with respect to the full amount of all defense costs and any liability or

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1 settlement in the Shalaby litigation without any cost sharing, apportionment between particular claims
2 or allegations, or limitation on amount.

3 **RESPONSE:** Worthington denies the allegations in Paragraph 25(b).

4 **SECOND CLAIM – BREACH OF CONTRACT/CONTRACTUAL INDEMNIFICATION**

5 26. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1
6 through 25 of this Complaint as if fully rewritten herein.

8 **RESPONSE:** Worthington refers to Paragraphs 1 through 25 of this Answer to Bernzomatic's
9 Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

10 27. Western has breached its express and implied obligations under the Supply Agreement
11 because it has failed to defend and indemnify Defendant/Third Party Plaintiff and hold it harmless with
12 respect to any of the amounts Defendant/Third Party Plaintiff has incurred and will incur in the future
13 because of the Shalaby litigation.

15 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
16 the truth of the allegations in Paragraph 27 and on that basis denies each and every allegation contained
17 therein.

18 28. Such breach of contract by Western has directly and proximately caused injury to
19 Defendant/Third Party Plaintiff, including, but not limited to, the payment of the entire cost of the
20 Shalaby litigation and the payment of fees and expenses in defending the Shalaby litigation.

22 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
23 the truth of the allegations in Paragraph 28 and on that basis denies each and every allegation contained
24 therein.

25 29. Worthington has breached its express and implied obligations under the Supply
26 Agreement because it has failed to defend and indemnify Defendant/Third Party Plaintiff and hold it

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1 harmless with respect to any of the amounts Defendant/Third Party Plaintiff has incurred and will incur
2 in the future because of the Shalaby litigation.

RESPONSE: Worthington denies the allegations in Paragraph 29.

30. Such breach of contract by Worthington has directly and proximately caused injury to
5 Defendant/Third Party Plaintiff, including, but not limited to, the payment of the entire cost of the
6 Shalaby litigation and the payment of fees and expenses in defending the Shalaby litigation.
7

RESPONSE: Worthington denies the allegations in Paragraph 30.

THIRD CLAIM – EQUITABLE INDEMNIFICATION

31. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1
through 30 of this Complaint as if fully rewritten herein.

RESPONSE: Worthington refers to Paragraphs 1 through 30 of this Answer to Bernzomatic's Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

32. Third Party Defendants, Western and Worthington, manufactured Bernzomatic-branded
MAPP gas cylinders and introduced those cylinders into the stream of commerce by selling them to
Defendant/Third Party Plaintiff.

18 **RESPONSE:** Worthington admits that Western and Worthington Cylinders Wisconsin, LLC
19 manufactured Bernzomatic-branded MAPP gas cylinders. Worthington admits that Worthington
20 Cylinders Wisconsin, LLC sold such cylinders to Irwin Industrial Tool Company. Worthington admits
21 that Western sold such cylinders to Newell Operating Company. Worthington denies the remaining
22 allegations in Paragraph 32 that are directed at Worthington. Worthington is without knowledge or
23 information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 32 and
24 on that basis denies each and every remaining allegation contained therein.
25

33. To the extent that the MAPP gas cylinder at issue is held to be defective, which
Defendant/Third Party Plaintiff expressly denies, one of the Third Party Defendants, Western and/or

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1 Worthington, introduced that defect by manufacturing and selling MAPP gas cylinders to
2 Defendant/Third Party Plaintiff for further distribution and resale to the Plaintiffs.

3 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
4 the truth of the allegations in Paragraph 33 and on that basis denies each and every allegation contained
5 therein.
6

7 34. To the extent that the MAPP gas cylinder at issue is held to have caused injuries and
8 damages to Andrew Shalaby and Sonia Dunn-Ruiz, which Defendant/Third Party Plaintiff expressly
9 denies, Third Party Defendants, Western and Worthington, are liable for those injuries as a result of the
10 manufacture and sale of those MAPP gas cylinders to Defendant/Third Party Plaintiff for further
11 distribution and resale.
12

13 **RESPONSE:** Worthington denies the allegations in Paragraph 34 that are directed at
14 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the
15 truth of the remaining allegations in Paragraph 34 and on that basis denies each and every remaining
16 allegation contained therein.
17

18 35. Because the cylinder product was discarded well before any lawsuit or involvement of
19 the Defendant/Third Party Plaintiff, there is no way to discover whether Western or Worthington
20 manufactured the cylinder at issue.
21

22 **RESPONSE:** Worthington denies the allegations in Paragraph 35.
23

24 36. Because it is certain that the manufacturer of the cylinder at issue was either Western or
25 Worthington, both Western and Worthington owe indemnity to the Defendant/Third Party Plaintiff for
26 any alleged harm caused by the cylinder.
27

28 **RESPONSE:** Worthington denies the allegations in Paragraph 36 that are directed at
29 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the
30

truth of the remaining allegations in Paragraph 36 and on that basis denies each and every remaining allegation contained therein.

7 **RESPONSE:** Worthington denies the allegations in Paragraph 37 that are directed at
8 Worthington. Worthington is without knowledge or information sufficient to form a belief as to the
9 truth of the remaining allegations in Paragraph 37 and on that basis denies each and every remaining
10 allegation contained therein.

FOURTH CLAIM- THIRD PARTY BENEFICIARY

13 38. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraphs 1
14 through 37 of this Complaint as if fully rewritten herein.

15 **RESPONSE:** Worthington refers to Paragraphs 1 through 37 of this Answer to Third Party
16 Plaintiff's Third Party Complaint and by this reference incorporates the same herein as though fully set
17 forth.

18 39. Defendant/Third Party Plaintiff is an intended third party beneficiary of the contract
19 between Western and Worthington for the sale of the cylinder business in September 2004, wherein an
20 express method was provided for determining which manufacturer is responsible for a cylinder when it
21 cannot be determined by serial number or other reliable information.
22

23 **RESPONSE:** Worthington admits that the contract between Western and Worthington
24 Cylinder Acquisition, LLC speaks for itself. Worthington denies the remaining allegations in Paragraph
25 39.

26 //

27

29 //

1 40. As set forth in the First Claim, both Third Party Defendants, Western and Worthington,
2 separately contracted with Defendant/Third Party Plaintiff, Bernzomatic, to defend and indemnify
3 Bernzomatic against claims involving cylinders manufactured by each of them.
4

5 **RESPONSE:** Worthington admits that the agreement between Irwin Industrial Tool Company
6 and Worthington Cylinders Wisconsin, LLC and the agreement between Western and Newell Operating
7 Company speak for themselves. Worthington denies the remaining allegations in Paragraph 40 that are
8 directed at Worthington. Worthington is without knowledge or information sufficient to form a belief
9 as to the truth of the remaining allegations in Paragraph 40 and on that basis denies each and every
10 remaining allegation contained therein.

11 41. One purpose of the contractual provision to identify a cylinder manufacturer in the
12 absence of a serial number or other reliable information is to insure that at least one of the
13 manufacturers will take responsibility for the manufacture of the cylinder.
14

15 **RESPONSE:** Worthington admits that the agreement between Irwin Industrial Tool Company
16 and Worthington Cylinders Wisconsin, LLC and the agreement between Western and Newell Operating
17 Company speak for themselves. Worthington is without knowledge or information sufficient to form a
18 belief as to the truth of the remaining allegations in Paragraph 41 and on that basis denies each and
19 every remaining allegation contained therein.
20

21 42. The identification of the cylinder manufacturer may be necessary to enforce
22 Defendant/Third Party Plaintiff Bernzomatic's rights to a defense and indemnification as set forth in the
23 First, Second and Third Claims.
24

25 **RESPONSE:** Worthington is without knowledge or information sufficient to form a belief as to
26 the truth of the allegations in Paragraph 42 and on that basis denies each and every allegation contained
27 therein.
28 //

FIFTH CLAIM – ESTOPPEL

43. Defendant/Third Party Plaintiff incorporates by reference the allegations in Paragraph 1 through 42 as if fully rewritten herein.

RESPONSE: Worthington refers to Paragraphs 1 through 42 of this Answer to Bernzomatic's Third Party Complaint and by this reference incorporates the same herein as though fully set forth.

44. Given the allegations in the Shalaby litigation that a Bernzomatic-branded MAPP gas cylinder caused Plaintiff's injuries, it is undisputed that either Western or Worthington manufactured the MAPP gas cylinder.

RESPONSE: Worthington denies the allegations in Paragraph 44.

45. If Plaintiffs are able to maintain an action against Defendant/Third Party Plaintiff Bernzomatic for injuries, Western and Worthington are estopped from denying responsibility for the manufacture, sale and distribution of the Bernzomatic-branded MAPP gas cylinder as it would lead to an unjust result.

RESPONSE: Worthington denies the allegations in Paragraph 45 that are directed at Worthington. Worthington is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 45 and on that basis denies each and every remaining allegation contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute a Cause of Action)

1. As a first, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that some or all of the claims for relief fail to state facts sufficient to constitute a cause of action against Worthington.

11

11

**SECOND AFFIRMATIVE DEFENSE
(Negligence of Third Party Plaintiff)**

2. As a second, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that Bernzomatic was careless and negligent with respect to matters alleged in the Third Party Complaint and such carelessness and negligence proximately caused and contributed to the extent of one hundred percent (100%) to the happening of the incident, loss and damages complained of, if any there were, and this contributory negligence bars or at least proportionately reduces any potential recovery.

THIRD AFFIRMATIVE DEFENSE (Negligence of Others)

3. As a third, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that the damages Plaintiffs and Third Party Plaintiff complained of, if any there were, were proximately contributed to or caused by the carelessness, negligence, fault or defects created by the remaining parties in this action, or by other persons, corporations or business entities, unknown to Worthington at this time and were not caused in any way by Worthington or by persons for whom Worthington is legally liable.

FOURTH AFFIRMATIVE DEFENSE (Imputed Negligence)

4. As a fourth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that the damages complained of, if any there were, were either wholly or in part, negligently or otherwise, caused by persons, firms, corporations, or entities other than Worthington, and such negligence or other conduct is either imputed to Bernzomatic, by reason of the relationship of such parties to Bernzomatic, and/or such negligence or other conduct comparatively reduces the percentage of negligence, if any, by Worthington.

11

11

1 **FIFTH AFFIRMATIVE DEFENSE**
2 (Statute of Limitations)

3 5. As a fifth, separate and distinct affirmative defense to the Third Party Complaint and
4 each cause of action thereof, some or all of Bernzomatic's causes of action are barred by the applicable
5 statute of limitations including, but not limited to, California Code of Civil Procedure, Sections 337,
6 339, and 343.

7 **SIXTH AFFIRMATIVE DEFENSE**
8 (Breach of Contract)

9 6. As a sixth, separate and distinct affirmative defense to the Third Party Complaint and
10 each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights as
11 asserted herein by Bernzomatic, Bernzomatic cannot assert any of the contractual claims contained in
12 the Third Party Complaint because Bernzomatic, as well as its agents, materially breached said contract
13 or contracts.

14 **SEVENTH AFFIRMATIVE DEFENSE**
15 (Intervening Cause)

16 7. As a seventh, separate and distinct affirmative defense to the Third Party Complaint and
17 each cause of action thereof, the injuries and damages of which Bernzomatic complains were
18 proximately caused or contributed to by the acts of other persons and/or entities. These acts were an
19 intervening, supervening and superseding cause of the damages, if any, of which Bernzomatic alleges it
20 suffered, thereby barring Bernzomatic from any recovery against Worthington.

22 **EIGHTH AFFIRMATIVE DEFENSE**
23 (Waiver)

24 8. As an eighth, separate and distinct affirmative defense to the Third Party Complaint and
25 each cause of action thereof, by conduct, representations and omissions, Bernzomatic has waived,
26 relinquished and/or abandoned any claim for relief against Worthington respecting the matters which
27 are the subject of the Third Party Complaint.
28 //

NINTH AFFIRMATIVE DEFENSE (Estoppel)

9. As a ninth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, by conduct, representations and omissions, Bernzomatic is equitably estopped to assert any claim for relief against Worthington respecting the matters which are the subject of the Third Party Complaint.

TENTH AFFIRMATIVE DEFENSE (Unclean Hands)

10. As a tenth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, no relief may be obtained by Bernzomatic under the Third Party Complaint by reason of the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE (Superseding & Intervening Cause)

11. As an eleventh, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that responsibility for any harm, injury or damages sustained by Bernzomatic was caused by acts or events which constitute a superseding and intervening cause.

TWELFTH AFFIRMATIVE DEFENSE (Failure to Mitigate)

12. As a twelfth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington alleges that Bernzomatic and/or its representatives failed and neglected to use reasonable care to protect themselves and to minimize the losses and damages complained of, if any there were. Worthington further alleges that Plaintiffs' alleged injuries, loss, or damages, if any, were aggravated by plaintiffs' failure to use reasonable diligence to mitigate same.

THIRTEENTH AFFIRMATIVE DEFENSE (Good Faith)

13. As a thirteenth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, Bernzomatic's causes of action are barred in whole or in part because

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any actions taken by Worthington were fair and reasonable and were performed in good faith based on all relevant facts known to Worthington at the time.

FOURTEENTH AFFIRMATIVE DEFENSE (Comparative Fault)

5 14. As a fourteenth, separate and distinct affirmative defense to the Third Party Complaint
6 and each cause of action thereof, to the extent Bernzomatic has the right to recover any amount from
7 Worthington (which right Worthington denies), such recovery must be reduced by the amount of
8 damage attributable to Bernzomatic's own negligence and fault.

FIFTEENTH AFFIRMATIVE DEFENSE (Offset and Reduction)

15. As a fifteenth, separate and distinct affirmative defense to the Third Party Complaint and
each cause of action thereof, Bernzomatic should be barred from recovery in whole or part, in
proportion to the fault attributed to itself.

SIXTEENTH AFFIRMATIVE DEFENSE (Constructive Fraud)

17 16. As a sixteenth, separate and distinct affirmative defense to the Third Party Complaint
18 and each cause of action thereof, at all times relevant, Bernzomatic or his agents failed, concealed
19 and/or refused to disclose certain material documents and facts to Worthington, thus misleading
20 Worthington to its extreme prejudice. Bernzomatic's or its agent's constructive fraud/unclean hands
21 serves as a bar to the entire action and as to Bernzomatic's claims as against Worthington.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(Willful and Gross Contributory Negligence)**

24 17. As a seventeenth, separate and distinct affirmative defense to the Third Party Complaint
25 and each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights
26 as asserted herein by Bernzomatic, Bernzomatic and its agents were willfully and grossly negligent in
27 the matters alleged, thereby causing and contributing to any injury, damage or loss to Bernzomatic.

EIGHTEENTH AFFIRMATIVE DEFENSE (Partial Indemnity)

18. As an eighteenth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights as asserted herein by Bernzomatic, Bernzomatic was negligent or legally responsible or otherwise at fault for the damages alleged in the Third Party Complaint. Worthington therefore requests that, in the event of a finding of any liability in favor of Bernzomatic or settlement or judgment against Worthington, an apportionment of fault be made among all parties by the court or jury. Worthington further requests a judgment and declaration of partial indemnification and contribution against all other parties or persons in accordance with the apportionment of fault.

NINETEENTH AFFIRMATIVE DEFENSE (Ratification, Consent)

19. As a nineteenth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights as asserted herein by Bernzomatic, such rights are unenforceable as Bernzomatic consented to or ratified the acts of Worthington after full disclosure of all pertinent facts.

TWENTIETH AFFIRMATIVE DEFENSE (Failure of Consideration)

20. As a twentieth, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights as asserted herein by Bernzomatic, such rights are unenforceable as Bernzomatic's claims are barred as a result of a failure of consideration.

**TWENTY-FIRST AFFIRMATIVE DEFENSE
(Assumption of Risk)**

21. As a twenty-first, separate and distinct affirmative defense to the Third Party Complaint and each cause of action thereof, if there presently exists or ever existed, any or all of the alleged rights

1 as asserted herein by Bernzomatic, such rights are unenforceable as Bernzomatic assumed the risk
2 involved in the transaction.

**TWENTY-SECOND AFFIRMATIVE DEFENSE
(Laches)**

5 22. As a twenty-second, separate and affirmative defense to the Third Party Complaint and
6 each cause of action thereof, Worthington alleges that Bernzomatic's unreasonable delay in seeking to
7 implead Worthington is a basis for denying its impleader.

**TWENTY-THIRD AFFIRMATIVE DEFENSE
(Unforeseeable Use)**

10 23. As a twenty-third, separate and affirmative defense to the Third Party Complaint and
11 each cause of action thereof, Worthington alleges that any alleged defect in any product allegedly
12 supplied by Worthington was caused by the unauthorized, unreasonable, and unforeseeable use of the
13 product by plaintiffs or other individuals, and accordingly, Worthington has no liability with respect to
14 the same.

TWENTY-FOURTH AFFIRMATIVE DEFENSE (Failure to Comply with Instructions)

24. As a twenty-fourth, separate and affirmative defense to the Third Party Complaint and
18 each cause of action thereof, Worthington alleges that Plaintiffs failed to comply with the written and
19 oral instructions relating to use of the product and this failure caused the alleged damages, if any,
20 suffered by plaintiffs.
21

**TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Assumption of Risk by Plaintiffs)**

24 25. As a twenty-fifth, separate and affirmative defense to the Third Party Complaint and
25 each cause of action thereof, Worthington alleges that Plaintiffs are barred from recovery in that they
26 were fully informed of the risk and possible consequences of the use of the product. Plaintiffs had full
27 knowledge of, and accepted and assumed any and all risks and possible adverse effects related to the

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1 use of the product described in plaintiffs' Complaint and the circumstances surrounding the use of the
2 product.

3 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**
4 **(Altered Product)**

5 26. As a twenty-sixth, separate and affirmative defense to the Third Party Complaint and
6 each cause of action thereof, Worthington alleges the product which is the subject of this action may
7 have been, without Worthington's knowledge or approval, redesigned, modified and/or altered in such a
8 way as to create the alleged defect which resulted in the injuries and damages claimed by Plaintiffs.
9

10 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**
11 **(State of the Art)**

12 27. As a twenty-seventh, separate and affirmative defense to the Third Party Complaint and
13 each cause of action thereof, Worthington alleges that that the products at issue met the standards of the
14 state of the art and state of scientific knowledge at the time of its manufacture and distribution to the
15 extent of available scientific and technological knowledge then available. Further, at all relevant times,
16 Worthington acted in conformity with the existing state of knowledge, common and accepted
17 procedures, and state of the art in the manufacture of the products.

18 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**
19 **(Negligence of Plaintiffs)**

20 28. As a twenty-eighth, separate and distinct affirmative defense to the Third Party
21 Complaint and each cause of action thereof, Worthington alleges that Plaintiffs were careless and
22 negligent with respect to matters alleged in the Complaint and such carelessness and negligence
23 proximately caused and contributed to the extent of one hundred percent (100%) to the happening of the
24 incident, loss and damages complained of, if any there were, and this contributory negligence bars or at
25 least proportionately reduces any potential recovery.

26 //

27 //

TWENTY-NINTH AFFIRMATIVE DEFENSE (Other Defenses)

29. As a twenty-ninth, separate and affirmative defense to the Third Party Complaint and each cause of action thereof, Worthington reserves all rights to supplement this Answer with additional denials and/or affirmative defenses, as further facts are discovered in this litigation.

WHEREFORE, WORTHINGTON INDUSTRIES, INC., having fully responded to Bernzomatic's Third Party Complaint against it, prays that it be henceforth discharged and that all costs be cast upon the Bernzomatic.

Dated: August 16, 2007

BOWLES & Verna LLP

By:

Richard A. Ergo
Cathleen S. Huang
Attorneys for Third Party Defendant
WORTHINGTON INDUSTRIES, INC.

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PROOF OF SERVICE

(Shalaby v. Irwin – USDC, Northern District of California, Case No: C 06 7026 MJJ)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & Verna LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On August 16, 2007, I served the following document(s):

WORTHINGTON INDUSTRIES, INC.'S ANSWER TO BERNOMATIC'S THIRD PARTY COMPLAINT

on the following parties in this action addressed as follows:

Attorneys for Plaintiffs

Mark D. Epstein
 Alborg, Veiluva & Epstein LLP
 200 Pringle Avenue, Suite 410
 Walnut Creek, CA 94596
 Tel: (925) 939-9880
 Fax: (925) 939-9915

Attorneys for Defendant and Third Party Plaintiff

Bernzomatic and Defendant The Home Depot
 J. Phillip Moorhead
 Keller, Price & Moorhead
 229 Avenue I, 2nd Floor
 Redondo Beach, CA 90277-5600
 Tel: (310) 540-1332

XXXX (BY MAIL) I caused each such envelope, with postage thereon fully paid, to be placed in the United States mail at Walnut Creek, California. I am readily familiar with the business practice for collection and processing of mail in this office. That in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service in Walnut Creek on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.

(BY PERSONAL SERVICE) I delivered each such envelope by hand to each addressee above.

(BY OVERNIGHT DELIVERY) I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by UPS/FEDERAL EXPRESS. I am readily familiar with Bowles & Verna's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Bowles & Verna's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS/FEDERAL EXPRESS or delivered to an authorized courier or driver authorized by UPS/FEDERAL EXPRESS to receive documents on the same date that it is placed at Bowles & Verna for collection.

(BY FACSIMILE) By use of facsimile machine number (925) 935-0371 or (925) 256-1755, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on August 16, 2007, at Walnut Creek, California.



DONNA WITHROW

**MARGINAL
FILED**

1 RICHARD A. ERGO (# 110487)
 2 CATHLEEN S. HUANG (#219554) AUG 16 PM 3:35
 3 BOWLES & Verna LLP
 4 2121 N. California Boulevard, Suite 875
 5 Walnut Creek, California 94596 RICHARD A. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
 Telephone: (925) 935-3300
 Facsimile: (925) 935-0371
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chuang@bowlesverna.com

6 Attorneys for Third Party Defendant
 7 Worthington Industries, Inc.

UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, and SONIA
 12 DUNN-RUIZ an individual,

13 Plaintiffs,

14 vs.

15 IRWIN INDUSTRIAL TOOL COMPANY, THE
 16 HOME DEPOT, INC., and DOES 2 through 100,
 inclusive,

17 Defendants.

18 BERNZOMATIC,

19 Third Party Plaintiff,

20 vs.

21 WESTERN INDUSTRIES, INC.,
 22 WORTHINGTON INDUSTRIES, AND ROES 2
 23 through 100, inclusive,

24 Third Party Defendants.

CASE NO.: C06-07026 MJJ

Judge Martin J. Jenkins

WORTHINGTON INDUSTRIES, INC.'S
 CORPORATE DISCLOSURE
 STATEMENT AND CERTIFICATION OF
 INTERESTED ENTITIES OR PERSONS

BY FAX

25 Pursuant to Federal Rules of Civil Procedure Rule 7.1(a), Third Party Defendant Worthington
 26 Industries, Inc. ("Worthington") certifies that it does not have a parent corporation and that there is no
 27 publicly-held corporation that owns 10% or more of Worthington's stocks.

28 CASE NO.: C06-07026 MJJ

WORTHINGTON INDUSTRIES INC.'S CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF
 INTERESTED ENTITIES OR PERSONS

1 Pursuant to the Northern District Court of California Civil Local Rules Rule 3-16, Worthington
2 certifies that the following listed persons, associations of persons, firms, partnerships, corporations
3 (including parent corporations) or other entities (i) have a financial interest in the subject matter in
4 controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or
5 in a party that could be substantially affected by the outcome of this proceeding:
6

7 Worthington's liability carriers are Travelers, ACE, XL, Zurich, Ohio Casualty, and Chubb.
8
9

10 Dated: August 16, 2007

BOWLES & Verna LLP

11
12 By:

13 Richard A. Ergo
14 Cathleen S. Huang
15 Attorneys for Third Party Defendant
16 WORTHINGTON INDUSTRIES, INC.

Case 3:06-cv-07026-MJJ Document 49 Filed 08/16/2007 Page 3 of 3

PROOF OF SERVICE

(Shalaby v. Irwin – USDC, Northern District of California, Case No: C 06 7026 MJJ)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & Verna LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On August 16, 2007, I served the following document(s):

**WORTHINGTON INDUSTRIES, INC.'S CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF
INTERESTED ENTITIES OR PERSONS**

on the following parties in this action addressed as follows:

Attorneys for Plaintiffs

Mark D. Epstein
 Alborg, Veiluva & Epstein LLP
 200 Pringle Avenue, Suite 410
 Walnut Creek, CA 94596
 Tel: (925) 939-9880
 Fax: (925) 939-9915

Attorneys for Defendant and Third Party Plaintiff

Bernzomatic and Defendant The Home Depot
 J. Phillip Moorhead
 Keller, Price & Moorhead
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XXXX (BY MAIL) I caused each such envelope, with postage thereon fully paid, to be placed in the United States mail at Walnut Creek, California. I am readily familiar with the business practice for collection and processing of mail in this office. That in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service in Walnut Creek on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.

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(BY OVERNIGHT DELIVERY) I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by UPS/FEDERAL EXPRESS. I am readily familiar with Bowles & Verna's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Bowles & Verna's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS/FEDERAL EXPRESS or delivered to an authorized courier or driver authorized by UPS/FEDERAL EXPRESS to receive documents on the same date that it is placed at Bowles & Verna for collection.

(BY FACSIMILE) By use of facsimile machine number (925) 935-0371 or (925) 256-1755, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on August 16, 2007, at Walnut Creek, California.

Donna Withrow
 DONNA WITHROW

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ORIGINAL
FILED
AUG 16 2007
RICHARD W. WIECKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

6 Attorneys for Third Party Defendant
 7 Worthington Industries, Inc.

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, and SONIA
 12 DUNN-RUIZ an individual,

Case No.: C06-07026 MJJ

Judge Martin J. Jenkins

13 Plaintiffs,
 14 vs.
 15 IRWIN INDUSTRIAL TOOL COMPANY, THE
 16 HOME DEPOT, INC., and DOES 2 through 100,
 inclusive,
 17 Defendants.

18 THIRD PARTY DEFENDANT
 19 WORTHINGTON INDUSTRIES, INC.'S
 20 MOTION TO TRANSFER VENUE

Date: September 25, 2007
 Time: 9:30 a.m.
 Ctrm: 11, 19th Floor

BERNZOMATIC,
 19 Third Party Plaintiff,
 20 vs.

BY FAX

21 WESTERN INDUSTRIES, INC.,
 22 WORTHINGTON INDUSTRIES, AND ROES 2
 through 100, inclusive,
 23 Third Party Defendants.

24 NOTICE OF MOTION

25 PLEASE TAKE NOTICE that on September 25, 2007, at 9:30 a.m. in Courtroom 11 of the
 26 above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Third Party
 27 Defendant Worthington Industries, Inc. ("Worthington") will move the Court for an order that the
 28

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1 above-captioned case be transferred to the United States District Court for the Southern District of
2 California in San Diego.

3 **STATEMENT OF RELIEF**

4 Pursuant to 28 U.S.C. Section 1404(a), Worthington brings this motion to transfer this action to
5 the Southern District in San Diego based on the interests of justice and convenience of the witnesses, as
6 all key third party witnesses work and reside in Southern California. If the venue is transferred to the
7 Southern District, the parties will be more likely to be able to offer the witnesses' testimony live and the
8 witnesses will be the least inconvenienced.

9 This Motion is based on the documents and exhibits filed herewith, including this Notice of
10 Motion, Memorandum of Points and Authorities, Request for Judicial Notice, the Declaration of
11 Cathleen S. Huang, and such other evidence and argument as may be presented on the hearing of this
12 Motion.

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Case 3:06-cv-07026-MJJ Document 50 Filed 08/16/2007 Page 3 of 17

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**6 Attorneys for Third Party Defendant
Worthington Industries, Inc.**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

1 ANDREW SHALABY, an individual, and SONIA DUNN-RUIZ an individual.

Plaintiffs,

14 vs.
15 IRWIN INDUSTRIAL TOOL COMPANY, THE
HOME DEPOT, INC., and DOES 2 through 100,
inclusive.

Defendants.

BERNZOMATIC.

Third Party Plaintiff,

vs.

**WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND ROES 2
through 100, inclusive,**

Third Party Defendants.

Case No.: C06-07026 MJJ

Judge Martin J. Jenkins

**THIRD PARTY DEFENDANT
WORTHINGTON INDUSTRIES, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO TRANSFER VENUE**

Date: September 25, 2007
Time: 9:30 a.m.
Ctrm: 11, 19th Floor

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I. INTRODUCTION

Third Party Defendant Worthington Industries, Inc. ("Worthington"), contemporaneously with filing its Answer, brings this motion to transfer this action to the Southern District in San Diego based on the interests of justice and convenience of the witnesses. While Worthington was just brought into this products liability action, the case has been pending for some time. Worthington's counsel has had the opportunity to review the deposition transcripts of five third party witnesses, who have been deposed. These San Diego area witnesses are critical to the defense of Plaintiffs' claims of product defect.

On April 21, 2005, Plaintiff Andrew Shalaby suffered serious burn injuries from a fire while camping in San Diego, California. Shalaby and his wife allege that fire was caused by a defect in their MAPP gas torch and/or cylinder, which Shalaby claims he was using to attempt to light a campfire. However, various third party witnesses who reside and work in the San Diego area have offered contradictory testimony as to how the accident occurred. Specifically, their testimonies would establish that Shalaby's conduct (including banging the torch against a hard surface and kicking the torch into the camp fire), rather than the alleged defect, caused the incident.

Consistent with Shalaby banging the cylinder against a hard surface is the fact that there was a hole on the top of the cylinder observed after the accident by two of these San Diego witnesses. However, the cylinder and torch were discarded shortly after the accident. Consequently, the only evidence of the physical condition of the cylinder after the accident will be the testimony of two campground rangers who observed the crack in the cylinder and described its size, location and nature. Their testimony will serve as the factual foundation for the expert witnesses to opine on the cause of the accident.

Having the trial in Northern California will likely prevent the defendants from putting on live testimony of some or all of the critical witnesses. In lieu of live testimony, defendants will likely have to offer critical testimony into evidence by reading deposition transcripts. To the extent that defendants are able to convince or compel any of the third party witnesses to travel 500 miles to testify, such will be a substantial burden on and inconvenience to the witnesses.

28 Accordingly, pursuant to 28 U.S.C. Section 1404(a), the interests of justice and the convenience

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1 of the witnesses demand that this action be transferred to the Southern District in San Diego where
 2 defendants will be able to offer the witnesses' testimony live and where the witnesses will be the least
 3 inconvenienced.

4 II. STATEMENT OF FACTS

5 In early to mid 2005, Shalaby allegedly purchased a Bernzomatic MAPP Gas torch kit from a
 6 Home Depot store located in El Cerrito, California. The kit allegedly included a torch and a yellow
 7 MAPP Gas cylinder filled with MAPP Gas. (Plaintiffs' First Amended Complaint ("FAC") attached as
 8 Exhibit A to Request for Judicial Notice ("RJN") at ¶ 9.) Shortly thereafter, Shalaby purchased several
 9 replacement cylinders. (FAC ¶ 11.) MAPP Gas is typically used for welding and soldering due to its
 10 high combustion temperature of 5301 degrees Fahrenheit (2927 degrees Celsius). (Joint Case
 11 Management Statement ("JCMS") RJN Exh. B at p. 2, § 1a.) In place of its conventional use, Shalaby
 12 regularly used his torch to light campfires. (JCMS, p. 2, § 1b.)

13 During the week of April 17, 2006, Shalaby, Plaintiff Dunn-Ruiz, and their two children were
 14 vacationing at a recreational vehicle park known as "Campland on the Bay" located in San Diego,
 15 California. (JCMS, p. 2, § 1b.) Shalaby took his torch and MAPP Gas cylinders with him on this trip.
 16 Shalaby claims that on April 21, 2006 when he attempted to light a campfire using his torch, the
 17 cylinder exploded and/or discharged its contents, causing Shalaby to suffer burn injuries. (FAC ¶¶ 20-
 18 22.)

19 Key third party witnesses including camp rangers, Randy Stephens and Warren Ratliff, and
 20 paramedics, Robert Price and Joe Russo, all work and reside in the Southern California area. (The
 21 deposition transcripts of Randy Stephens, Warren Ratliff, Robert Price, and Joe Russo are attached as
 22 Exhibits A to D to the Declaration of Cathleen S. Huang ("Huang Decl."). See Huang Decl. Exh. C,
 23 Price dep. 5:10-6:21; Huang Decl. Exh. A, Stephens dep. 9:1-22; Huang Decl. Exh. B, Ratliff dep. 8:5-
 24 9:4; Huang Decl. Exh. D, Russo dep. 10:19 – 11:9.) They offer the following testimony, which is
 25 highly probative on the issue of causation.

26 Ranger Randy Stephens was on duty at Campland on the day of the incident. (Huang Decl. Exh.
 27 A, Stephens dep. 11:7-10.) Fellow campers witnessed the incident and one camper reported it and

1 Ranger Stephens was radioed to go to the site of the incident. (Huang Decl. Exh. A, Stephens dep.,
2 10:4:14; 11:7-19.) Stephens went to the accident scene and heard Shalaby repeating out loud: "I'm an
3 idiot. I can't believe I'm so stupid." "This is all my fault." (Huang Decl. Exh. A, Stephens dep.,
4 35:11-24.)

5 Stephens has experience with MAPP gas and torches. (Huang Decl. Exh. A, Stephens dep.,
6 48:9-23.) Based on his observations, the torch being used was not a proper torch for a MAPP gas
7 cylinder. (Huang Decl. Exh. A, Stephens dep., 49:8-50:18.)

8 Warren Ratliff is also a ranger at Campland. (Huang Decl. Exh. B, Ratliff dep., 9:8-22.) Ratliff
9 went to the accident scene along with the fire department and paramedics. (Huang Decl. Exh. B, Ratliff
10 dep., 17:23-18:7.) At the scene, Ratliff spoke to neighboring campers. (Huang Decl. Exh. B, Ratliff
11 dep., 18:21-19:2.) Among other things, campers told him that Shalaby had attempted to light a
12 campfire with his torch and when he was unsuccessful, he became "frustrated" and started banging the
13 torch on the campfire ring. (Huang Decl. Exh. B, Ratliff dep., 19:7-20:23.)

14 Ratliff made an hour-long examination of the torch and cylinder after the incident. (Huang
15 Decl. Exh. B, Ratliff dep., 66:20-23.) Based on his examination, Ratliff felt that the torch apparatus
16 may have been improperly attached to the cylinder or not placed fully in the "on" position. (Huang
17 Decl. Exh. B, Ratliff dep., 31:5-13.) Ratliff has extensive experience with MAPP gas torches, having
18 used them to weld pipes together while he worked as a certified welder for the Navy, a plumber, and as
19 a maintenance person. (Huang Decl. Exh. B, Ratliff dep., 56:5-7, 58:22-25, 59:6-12, and 62:21-65:10.)

20 During his examination, Ratliff made many observations of the torch and cylinder remnants as
21 follows. Ratliff observed a crack in the cylinder that appeared to have been caused by banging the
22 cylinder against a hard surface. (Huang Decl. Exh. B, Ratliff dep., 67:21-70:19.) Ratliff noted that the
23 threaded neck of the cylinder just above the edge of the crack tilted away from the crack at a slight
24 angle, which suggested to Ratliff that the torch may have been banged against something, thereby
25 adjusting the threaded area of the cylinder. (Huang Decl. Exh. B, Ratliff dep., 70:10-19; 72:17-73:4)
26 Ratliff said the crack was at the top of the cylinder at the point where the cylinder body tapered to the
27
28

1 threaded neck and where the torch apparatus was attached. (Huang Decl. Exh. B, Ratliff dep., 67:21-
2 25; 68:20-24.) The edges of the crack appeared to have been forced outward from the interior of the
3 cylinder as if from an explosion. (Huang Decl. Exh. B, Ratliff dep., 68:1-10.) When Ratliff picked up
4 the torch and cylinder, the torch apparatus was still attached, but it was loose and did not appear to be
5 screwed on entirely. (Huang Decl. Exh. B, Ratliff dep., 73:5-10.)

6 Ranger Stephens made similar observations of the cylinder. (Huang Decl. Exh. A, Stephens dep.
7 42:14-43:1.) In particular, he observed a split approximately two-and-a-half inches long and a quarter
8 inch wide at the neck of the cylinder. (Huang Decl. Exh. A, Stephens dep. 42:14-43:1.) He also saw
9 that the cylinder had burst open just beyond the threads at the neck. (Huang Decl. Exh. A, Stephens
10 dep. 42:1-7.)

11 Paramedic Robert Price responded to this accident as an intern for Station 21 of the San Diego
12 Fire Department. (Huang Decl. Exh. C, Price dep., 6:15-7:14.) Price treated Shalaby at the scene.
13 (Huang Decl. Exh. C, Price dep., 9:5-10:10.) Price saw beer bottles at the campsite and smelled alcohol
14 on Shalaby's breath. (Huang Decl. Exh. C, Price dep., 22:13-23:6.)

15 Price was one of the persons that inputted information into what eventually became the fire
16 department report. (Huang Decl. Exh. C, Price dep., 12:12-13:21) One of Price's entries into the report
17 reflects:

18 "Patient was kicking around a propane torch. It went into a fire and blew up and
19 burned him. Family called 911." (Huang Decl. Exh. C, Price dep., 19:19-20:1.)

20 Price wasn't sure whether this statement was made to him by Shalaby or someone else. (Huang
21 Decl. Exh. C, Price dep., 20:13-17.) However, Price's supervisor, Joe Russo, was present when Price
22 was interviewing Shalaby. (Huang Decl. Exh. D, Russo dep., 14:3-25; 22:6-17.) Russo heard Shalaby
23 state that he had kicked a "propane" cylinder into the fire and that it exploded. (Huang Decl. Exh. D,
24 Russo dep., 22:18-23:7.)

25 An unidentified engineer with fire department told Stephens and Ratliff that the fire department
26 did not need to take possession of the torch or cylinder. (Huang Decl. Exh. A, Stephens dep., 61:22-
27 62:4; Huang Decl. Exh. B, Ratliff dep., 35:5-36:7.) Stephens recalls that the engineer said that they did
28 not need the evidence because:

1 “...the gentleman in question, the patient, as they stated, had already told them, and
 2 that it was an accident.” (Huang Decl. Exh. A, Stephens dep., 61:22-62:4.)

3 Including Price and Russo, seven persons from San Diego Fire Department Station 21 responded to this
 4 incident. (Huang Decl. Exh. D, Russo dep., 29:17-30:20; 45:6-8; Exhibit 8.)

5 Ratliff took the cylinder and torch back to the ranger station where it remained for two or three
 6 days. (Huang Decl. Exh. B, Ratliff dep., 36:15-21.) Thereafter, Ratliff believes that another staff
 7 member at the campground threw the torch and cylinder away. (Huang Decl. Exh. B, Ratliff dep.,
 8 37:15-17.)

9 Plaintiffs originally filed this action in Alameda Superior Court naming Newell Rubbermaid,
 10 Inc. (“Newell”) and The Home Depot, Inc. (“Home Depot”) as defendants. The case was removed to
 11 the Northern District. Thereafter, plaintiffs filed an amended complaint in which Home Depot remains
 12 a defendant, but Irwin Industrial Tool Company, Inc. (“Irwin”) was named in place of Newell.
 13 Bernzomatic, a division of Irwin, has sued Worthington and Western for indemnity in a third party
 14 complaint.

17 III. LEGAL ARGUMENT

18 A. Pursuant to 28 U.S.C. Section 1404(a), Venue Should Be Transferred to the 19 Southern District of California Because It Is The Most Convenient Forum For All 20 Key Witnesses

21 Motions to transfer venue are governed by 28 U.S.C. Section 1404(a), which provides:

22 [f]or the convenience of the parties and witnesses, in the interest of justice, a
 23 district court may transfer any civil action to any other district or division
 24 where [the action] might have been brought.

25 The purpose of Section 1404(a) is: “to prevent the waste of ‘time, energy and money’ and to protect
 26 litigants, witnesses, and the public against unnecessary inconvenience and expense.” *Van Dusen v.*
Barrack, (1964) 376 U.S. 612, 616. Since all of the key third party witnesses in this case live and work
 27 in the San Diego area, this case should be transferred to the Southern District for their convenience.

1 **1. The Southern District has Personal and Subject Matter Jurisdiction over the
2 Parties and is a Proper Venue**

3 As a threshold matter, the moving party of a motion to transfer venue must show that the forum
4 to which they seek to transfer is a forum in which the action originally might have been brought. See
5 *Hoffman v. Blaski*, (1960) 363 U.S. 335, 344; 28 U.S.C. § 1404, subd., (a). The California District
6 Courts have interpreted this to mean that “[t]he transferee court must have had complete personal
7 jurisdiction over defendants, subject matter jurisdiction over the defendants, and proper venue had the
8 claim originally been brought in that court.” *Royal Queentex Enterprises, Inc. v. Sara Lee Corp.* (N.D.
9 Cal. 2000) 2000 U.S. Dist. LEXIS 10139, 8. (Referencing *Hoffman*, 363 U.S. at 343-344.)

10 Here, all three of these requirements are satisfied. None of the defendants or third party
11 defendants contest personal jurisdiction. The court has proper subject matter jurisdiction because there
12 is diversity of citizenship¹ and because the claim exceeds \$75,000.² Venue in the Southern District is
13 proper under 28 U.S.C. Section 1391(a)(2)³ in that the accident giving rise to this action occurred
14 within the Southern District.

15 **2. The Most Important Factor – “Convenience of the Witnesses” – Weighs In
16 Favor of a Transfer**

17 Once a court has determined that an action could have originally been brought in a different

18 ¹ There is complete diversity among the Plaintiffs, the Defendants, and Third Party Defendants.
19 Plaintiffs are citizens of California. Defendant Irwin Industrial Tool Company, Inc. is a Delaware
20 corporation, with its principal place of business in North Carolina. Defendant The Home Depot, Inc. is
21 a Delaware corporation, with its principal place of business in Georgia. Worthington is incorporated in
22 and has its principal place of business in Ohio. Third Party Defendant Western Industries, Inc., is
23 incorporated in and has its principal place of business in Wisconsin.

24 ² Shalaby's past medial specials alone exceed \$300,000.

25 ³ 28 USCA Section 1391(a)(2) provides: “[a] civil action wherein jurisdiction is founded only
26 on diversity of citizenship may, except as otherwise provided by law, be brought only in (2) a judicial
27 district in which a substantial part of the events or omissions giving rise to the claim occurred, or a
28 substantial part of property that is the subject of the action is situated.”

1 district, it must then determine whether the transfer would further the "convenience of parties and
2 witnesses" and "the interest of justice." *Royal Queentex, supra* at 7. The district court has discretion to
3 adjudicate motions for transfer according to "an individualized, case-by-case consideration of
4 convenience and fairness." *Jones v. GNC Franchising, Inc.*, (9th Cir. 2000) 211 F.3d 495, 498. The
5 courts weigh eight factors to determine whether a transfer is appropriate in a particular case:
6

7 (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the
8 witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the
applicable law, (6) feasibility of consolidation of other claims, (7) any local interest
in the controversy, and (8) the relative court congestion and time of trial in each forum.
9

10 *Royal Queentex, supra.* at 7-8. Among the eight factors, "convenience of the witnesses" is the most
11 important. *Amini Innovation Corp. v. JS Imps., Inc.*, (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 43758,
12 *43-46; *Accord Royal Queentex, supra* at 18; *Decter v. Gill* (ED. Cal. 2006) 2006 U.S. Dist. LEXIS
13 90415, *7; See also *A. J. Industries, Inc. v. U. S.*, (9th Cir. 1974) 503 F.2d 384, 386-87 (discussing the
14 importance and history of the convenience of witnesses in a Section 1404(a) transfer).

15 Federal Rules of Civil Procedure Rule 45(b)(2) permits service of a trial subpoena anywhere in
16 California based on the fact that California state court statutes allow for such. Regardless, the practical
17 reality is that the defendants will be unable to arrange for most, let alone all, of the critical witnesses to
18 travel from the San Diego area to Northern California to testify at trial. The witnesses may have
19 compelling reasons not to travel and spend one or more nights away from their homes and work. The
20 witnesses' cooperation may be thoroughly tainted by the inconvenience of being compelled to travel to
21 Northern California. Or the witnesses may simply not come. In *Polaroid Corp. v. Casselman*,
22 (S.D.N.Y. 1962) 213 F. Supp. 379, 382 (cited in *Pacific Car and Foundry Co. v. Pence* (9th Cir. 1968)
23 403 F.2d 949, 954 and in *Vivoli v. Vivoli's* (C.D. Cal. 1984) 606 F.Supp. 106, 108), the Court
24 recognized that "even if the witnesses are willing to travel to [plaintiff's choice of forum] the parties
25 would be subjected to expense, the witnesses to inconvenience, and the trial, in all likelihood, to
26
27
28

1 interruption and delay. All of this can be avoided by trial in [the more convenient forum.]” Thus, the
2 interests of justice cry out for this case being transferred to the Southern District.

If the trial were in San Diego, the witnesses could simply be on standby and appear at trial on short notice. Further, if their testimony were not completed by the end of the court day, they would be able to return to their homes that night. In contrast, if the case remains in the Northern District, the witnesses will not have that luxury. Rather, they will have to travel 500 miles to San Francisco. They will have to spend the night away from home the day before their *scheduled* testimony and spend additional nights to the extent they are not called when scheduled or their testimony is not completed by the end of the court day.

Perhaps keeping the case in the Northern District would be justified if it inconvenienced just one witness. However, Worthington has cited critical testimony of four separate witnesses. Moreover, there were five additional persons from the San Diego Fire Department at the scene who may also have critical testimony. (To date, only one of those persons has been deposed.) Further, the neighboring campers who witnessed Shalaby's actions leading up to the accident may be called as witnesses. Finally, Shalaby's initial treatment was at a hospital in the San Diego area. Thus, there may be well in excess of a dozen third party witnesses needed to testify at trial who live and work in the San Diego area.

3. Whether Witnesses Can Testify Live Is Considered In A Motion to Transfer

In evaluating the effect of a transfer on the convenience of witnesses, courts consider the availability of certain witnesses and their live testimony at trial. *Polaroid, supra*, at 382. There is no question that Shalaby suffered serious burns and a jury will likely be sympathetic to his injuries. Worthington anticipates that Shalaby will deny banging his cylinder on a hard surface, kicking his cylinder into the fire or admitting fault for the accident. To counter Shalaby's testimony, it will be critical to have the third party witnesses appear live at trial, as opposed to having to rely on reading

1 their deposition transcripts. Needless to say, reading the testimonies will greatly reduce their impact.
2 As the *Polaroid* Court aptly observed, presenting testimony by deposition does not have the same force
3 and effect as live testimony and must be considered in a motion to transfer:
4

5 Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility. In
6 determining credibility, there is nothing like the impact of live dramatis personae
7 on the trier of the facts. Thus, the transfer which defendant seeks will not only serve the convenience of the witnesses but, more importantly, the ends of justice.

8 *Polaroid, supra* at 382-383.

9

10 **4. The Testimonies of the Key Third Party Witnesses Are Critical As They Help Establish the Cause of The Accident.**

11 The testimonies of the third party witnesses are pivotal in this case – as they will help the trier of
12 fact to determine how this accident occurred and whether any defective product caused, or contributed
13 to the cause of, the accident. Based on the deposition testimonies cited above, it was Shalaby's
14 conduct, rather than an alleged defect, that caused the accident. Specifically, the testimonies indicate
15 that:

16

17 1. Shalaby became frustrated with his torch and banged the cylinder against a hard object.
18 2. Shalaby kicked the torch and cylinder into a fire.
19 3. Shalaby made admissions that he was "stupid" and at fault for the accident.
20 4. Shalaby did not fully connect the torch to the cylinder.
21 5. Shalaby used the wrong type of torch with the cylinder.

22 The testimonies of these lay witnesses are even more essential and valuable because the physical
23 evidence has been discarded. Generally in product liability cases where physical evidence is available,
24 liability often turns on the opinions of experts given after careful examination and testing of the product
25 in question. Here, through no fault of their own, defendants' experts will have no such opportunity. To
26 be able to opine on causation, it will be extremely important to the experts to know the nature of the
27 damage to the cylinder, i.e. the location of the crack, the size of the crack, a description of the crack,

1 etc. Hence, without the cylinder and the torch, the experts will have to rely on the two rangers' 2 description of the physical damage, as the foundational facts to determine whether the potential theories 3 of the accident offered are consistent with the physical damage.

4 **5. Plaintiffs' Choice of Forum Has Little Connection to This Case**

5 Worthington acknowledges that Plaintiffs' choice of forum is accorded weight in the court's 6 determination of the propriety of a transfer. However, if the Plaintiff's choice of forum has no real 7 connection with the litigation and the movant has made a strong showing of inconvenience, a transfer 8 should be granted. *See Pacific Car, supra* at 954; *Polaroid, supra*, at 383. Indeed, "[p]laintiff's choice 9 of forum, then, is not the final word." *Pacific Car, supra* at 954.

10
11 Besides being plaintiffs' domicile, this forum has tenuous nexus to the fundamental issue of this 12 case: the cause of the accident. In contrast, being the forum where the incident occurred and where the 13 key witnesses reside, the Southern District has a very significant connection. Worthington has clearly 14 identified who the inconvenienced witnesses will be, and what their testimony will be and how that 15 testimony will be relevant to this case. These witnesses will play critical roles in this case and a venue 16 change will have a significant impact on their convenience. Therefore, the scale significantly tips in 17 favor of a transfer.

18
19 **IV. CONCLUSION**

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21 The interests of convenience and justice favor transferring this case to the Southern District. If 22 the trial occurs in Northern California, witnesses critical to the defense of this matter will either not 23 appear or will suffer major inconvenience. The testimony of these witnesses does not involve minor 24 issues, but rather goes to the heart of how this accident occurred. Moreover, because the evidence has 25 been discarded, the only evidence of the physical condition of the cylinder – which will be critical to 26 expert analysis – will be the testimony of the two San Diego area witnesses. Because these witnesses 27 will contradict plaintiffs' version of the accident, it is imperative that the jury be able to observe the 28 live testimony rather than hear monotonous readings of deposition transcripts. Accordingly,

1 Worthington respectfully requests that this Court grant its motion to transfer venue to the Southern
2 District.

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4 Dated: August 16, 2007

BOWLES & VERNAL LLP

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6 By:
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